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April 3, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: Joint Consolidated Reply
Alaska Broadcasters Association,
Arkansas Broadcasters Association,
Mississippi Association of Broadcasters, and
New Mexico Broadcasters Association
MM Docket No. 98-204

Dear Ms. Dortch:

Transmitted herewith, on behalf of the Alaska Broadcasters Association, the Arkansas Broadcasters Association, the Mississippi Association of Broadcasters, and the New Mexico Broadcasters Association, is an original and ten copies of its "Joint Consolidated Reply" to the "Partial Opposition" filed by the EEO Supporters, and the Opposition to Petitions for Reconsideration" filed by NOW, et. al., in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Sincerely,

Lee G. Petro

Enclosures

G-10

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Review of the Commission's Broadcast
and Cable Equal Employment
Opportunity Rules and Policies

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 98-204

To: The Commission

JOINT CONSOLIDATED REPLY

The Alaska Broadcasters Association, the Arkansas Broadcasters Association, the Mississippi Association of Broadcasters, and the New Mexico Broadcasters Association (collectively, the "Joint State Associations"), hereby submit this **JOINT CONSOLIDATED REPLY** to the "Partial Opposition" filed by the EEO Supporters on February 26, 2003, and the "Opposition to Petitions for Reconsideration" filed by the National Organization for Women, NOW Legal Defense and Education Fund, NOW Foundation, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of Press (collectively, "NOW"), filed on March 24, 2003.¹

The Joint State Associations filed their Petition seeking several modifications to the rules adopted in the *EEO Report and Order*. Both NOW and EEO Supporters filed Oppositions to the Petition, and the National Association of Broadcasters and the State Broadcasters Association filed comments in support of the Petition.

¹ The Joint State Associations filed a Petition for Reconsideration of the EEO Second Report and Order on February 6, 2003 (the "Petition"). *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rule Making, 17 FCC Rcd 24,018 (2002) (the "*EEO Report and Order*").

As discussed in more detail below, the Oppositions filed by NOW and EEO Supporters should be rejected. The Joint State Associations argued in their Petition that several of the requirements contained in the EEO Report and Order should be reconsidered, since they were inconsistent with the judicially-authorized goals of the Commission's EEO rules. In Opposition, both NOW and EEO Supporters take issue with the refinements suggested by the Joint State Associations.' These oppositions, however, fail to recognize the substantial limitations imposed on the Commission by two rounds of judicial review of its EEO rules, and thus, should be rejected.

DISCUSSION

Neither NOW nor EEO Supporters opposed the Joint State Associations' argument that the Commission should establish a limited window after the anniversary of the license renewal filing date for licenses to place their Annual EEO Public File Report in the station's public inspection file. See Petition, **pg. 4**. As such, the Joint State Associations urge the Commission to modify its rules to take into consideration this necessary change.

On the other hand, both NOW and EEO Supporters oppose the Joint State Associations' request that the Commission delete its requirement that licensees list the referral source of each hiree. In addition, NOW objects to the Joint State Associations' request that the Commission codify the "exigent circumstances" exception that the Commission authorized in the EEO Report and Order.

² In their Opposition, EEO Supporters also provide yet another long discussion regarding the Blumrosen study that was provided to the Commission after the close of the comment period in this proceeding. Despite EEO Supporters' argument that the study was "not disputed by any party," one could speculate that this is largely due to the fact that the Study was submitted after the close of the comment period, and is *not* indicative of universal support of the arguments presented therein.

A. THE COMMISSION SHOULD CLOSE THE BACKDOOR TO FRIVOLOUS AND UNAUTHORIZED FILINGS

As noted in the Petition, the Commission's stated purpose for adopting the latest incarnation of the EEO rules was to emphasize outreach in recruitment to all qualified job applicants. *EEO Report and Order*, ¶ 1. In fact, it has stated that the new rules "focus on the process of recruitment, not the results thereof." *Id.*, ¶134. There is a good reason that the Commission defined its new EEO rules in this context – namely, two D.C. Circuit Court of Appeals' decisions that have thrown out the past two rounds of EEO rules focusing on race-based hiring requirements.³

As such, the Joint State Associations sought to eliminate one loophole that would permit the same type of intimidation and frivolous filings that the DC Circuit previously found unconstitutional. Specifically, the Joint State Associations requested reconsideration of the requirement that licensees make public the recruitment source for each hiree. While the Joint State Associations do not oppose the public disclosure of the recruitment sources to which they provide notice of job opportunities, the Joint State Associations do object to the disclosure of the recruitment source of the hiree. If the Commission's goal truly is to focus on the "process of recruitment...[and]...not the results", there is little need for the disclosure as to results of each specific recruitment effort.

Instead, the Joint State Associations can foresee a day in the future where a licensee's renewal application is opposed because only 2% of its hirees come from recruitment sources that would typically have a large pool of racial or gender-

³ See *Lutheran Church - Missouri Synod v. FCC*, 141 F.3d 344, *reh. denied*, 154 F.3d 494 (1998); See also *MD/DC/DE Broadcasters Ass'ns v. FCC*, 236 F.3d 13, *reh. denied*, 253 F.3d 732 (2001).

specific applicants. The inevitability of that day was foreshadowed **by** EEO Supporter's own comments, such as:

- The Commission should afford *discriminators* no haven *from* accountability;
- Yet it can hardly be said that all broadcasters will take this data seriously unless they are aware that the *public* is watching; and
- [t]he sunlight of public *exposure* and accountability is healthy.

EEO Supporters Opposition, pg. 3-4. This is the specific type of intimidation that the DC Circuit sought to eliminate in Lutheran *Church*⁴ and it should be eliminated from the Commission's latest rules as well.

Moreover, **NOW's** concern that this information is necessary since, otherwise, "broadcasters would be unable to track which sources are efficient and adjust their plan" is a red herring as well. NOW Opposition, pg. 21. Broadcasters will still be able to track the success of their **own** recruitment and hiring efforts regardless of whether they make the recruitment source for each hiree available to the public.

Therefore, the Commission must eliminate this unnecessary requirement. EEO Supporters have already noted that they plan to analyze broadcasters' Annual Employment Reports and conduct statistical analyses on each station to unearth the "massive discrimination" they believe to be present in the industry.⁵ The provision

⁴ Lutheran Church, *supra* note 3. ("the EEO regulations before us extend beyond outreach efforts and certainly influence ultimate hiring decisions.").

In NOW's Opposition, it argues that the Joint State Associations failed to provide evidence of objections to renewal applications based on EEO hiring practices. See NOW Opposition, pg. 21, n.89. While NOW is correct that the Petition failed to provide a string cite as to the numerous objections to renewals filed by parties during the 1980's and 1990's with respect to broadcast stations' failure to comply with the numerical hiring requirements imposed by the Commission, it did so because this practice is of common knowledge to the communications bar and the FCC. In short, it is a matter of public knowledge. Truly, NOW is not suggesting that such objections and pleadings were not filed. A string cite of such cases can be provided upon request.

⁵ See EEO Supporters, Petition for Clarification or, in the Alternative, for Partial Clarification, pg. 7, MM Docket 98-204 (Feb. 6, 2003).

of the recruitment source of each hiree will only add fuel to this unwarranted and unauthorized fire, and it must be eliminated.

B. THE COMMISSION MUST CODIFY "EXIGENT CIRCUMSTANCES" EXCEPTION

In the EEO Report and Order, the Commission noted that it understood that there would be circumstances under which a licensee would be forced to hire someone without adhering to the strict EEO recruitment requirements. Specifically, the Commission stated that:

the requirement that broadcasters recruit for every full-time vacancy, unless exigent circumstances exist, will become a component of our Rule.

EEO Report and Order, ¶ 86. However, as noted by the Joint State Broadcasters in its Petition, when it came to draft the various components of the EEO rules, this exception to the rule was not inserted.

While the Joint State Broadcasters do not propose that the Commission develop a comprehensive list of all possible exigent circumstances available to broadcasters, it would be entirely appropriate to modify the language of Section 73.2080 to read:

(c) Specific EEO program requirements. Under the terms of its program, a station employment unit must:

(1) Recruit for every full-time job vacancy in its operation, except in exigent circumstances.

This language would establish that the existence of exigent circumstances as an exception to the general rule, and still preserve the flexibility sought by the commission and NOW.⁶

⁶ *EEO Report and Order*, ¶ 83. See *NOW Opposition*, pg. 15 ("to preserve flexibility in the application of the narrow exemption, the Commission should not expand or codify the exemption.").

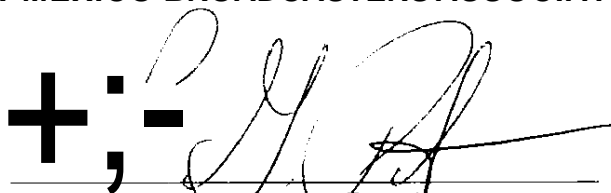
CONCLUSION

Therefore, the Joint State Broadcasters request that the Commission reject the Oppositions of NOW and EEO Supporters. The Commission has seen its EEO rules vacated on two occasions due to "quota" based requirements that result in broadcasters being harassed and intimidated. The adoption of rules that would perpetuate such activities can not survive judicial scrutiny. Moreover, the Commission must codify the recruitment safety valve discussed in the EEO Report and Order. None of the arguments raised by NOW or EEO Supporters counter the strong public interest derived by the requested changes.

Respectfully Submitted,

**ALASKA BROADCASTERS ASSOCIATION
ARKANSAS BROADCASTERS ASSOCIATION
MISSISSIPPI ASSOCIATION OF BROADCASTERS
NEW MEXICO BROADCASTERS ASSOCIATION**

By:

A large, stylized handwritten signature in black ink, appearing to read "V. Curtis, Jr.", is written over a horizontal line.

Vincent J. Curtis, Jr., Esquire
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April 3, 2003

CERTIFICATE OF SERVICE

I, Carla M. Whitlock, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that a true copy of the foregoing "Joint Consolidated Reply" was sent this 3rd day of April, 2003 via United States First Class Mail, postage prepaid, to the following:

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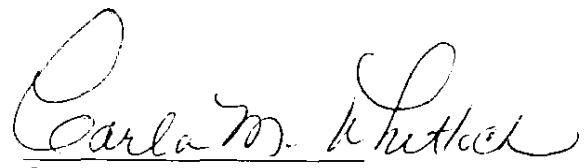
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